United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

NO. 76-7380

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-7380

ARTHUR F. TURCO, JR.,

Plaintiff-Appellant,

-against-

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

BRIEF FOR APPELLEES, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, THE JUSTICES AND THE CLERK THEREOF

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ARTHUR F. TURCO., JR.,

Plaintiff-Appellant,

-against-

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

BRIEF FOR APPELLEES, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, THE JUSTICES AND THE CLERK THEREOF

Statement of the Case

The plaintiff appeals from an order of the United States District Court for the Western District of New York (HAROLD P. BURKE, U.S.D.J.) which dismissed the complaint in an action seeking declaratory and injunctive relief as a result of plaintiff's disbarment by an order of the Appellate Division dated January 28, 1975.

This action was commenced in the United States District Court, Western District of New York, by the service of a summons and verified complaint against the Monroe County Bar Association and the Appellate Division, Fourth Department, on or about March 11, 1975. Plaintiff also served an order to show cause and temporary restraining order dated March 11, 1975 which stayed the appellee Appellate Division, Fourth Department, from enforcing the order of disbarment "until the hearing on March 24, 1975 and determination of the motion then to be made".

On June 30, 1976 the District Court rendered a decision and order which dismissed the action and which granted plaintiff a stay pending this appeal.

The plaintiff seeks a declaration that certain of New York State's disbarment procedures denied him his constitutional rights and that New York Civil Practice Law and Rules, § 5601, is unconstitutional and a denial of due process of law insofar as said section 5601 did not afford plaintiff an appeal as of right to the New York Court of Appeals in the disbarment proceeding. The plaintiff filed an amended complaint on May 29, 1975 adding as defendants the Presiding Justice and Justices of the Appellate Division and the Chief Clerk thereof. The amended complaint was served in response to a motion by the defendants, prior to answer, in which the defendants moved to dismiss on the grounds that the Court lacked jurisdiction of the subject matter of the action and of the defendant Appellate Division, that the complaint failed to

state a cause of action upon which relief could be granted, and upon the grounds of res judicata, collateral estoppel and upon the principles of federalism and comity.

Questions Presented

1. Should a Federal District Court refrain from interfering in a State proceeding relating to the discipline of a member of the State's bar?

The answer of the Court below was in the affirmative.

2. Does the absence of an appeal as of right to the Court of Appeals from an Appellate Division order of disbarment deny the disbarred attorney due process and equal protection of the law?

The answer of the Court below was in the negative.

3. Did the Appellate Division deprive plaintiff of his right of due process in the procedures which it followed in the disciplinary proceeding conducted herein and in concluding that plaintiff's two misdemeanor convictions in Maryland and in New York City and other related admitted actions were a proper basis for disbarment?

The Court below did not address itself to this question.

Facts

The plaintiff was disbarred by the Appellate Division, Fourth Department, by an order dated January 28, 1975. The complete factual basis for the order of disbarment is contained in the opinion of the Appellate Division (46 A D 2d 490 [1975]). In

view of the length thereof only those portions which are believed to be necessary for a discussion of the issues covered by this brief will be set forth herein.

On or about April 4, 1972 the Appellate Division, Fourth Department, directed that a proceeding be commenced to investigate the plaintiff's conduct. As a result of this investigation the Monroe County Bar Association filed a petition in the Appellate Division which alleged that the plaintiff "is or may be guilty of professional misconduct" in his office as an attorney. The petition alleged specifically that plaintiff had been indicted in Baltimore, Maryland on May 1, 1970 on charges of murder, conspiracy to commit murder, soliciting to commit a felony (murder), common law assault and soliciting to commit a felony (kidnapping). The petition further alleged that on February 14, 1972 plaintiff entered a plea of guilty* to the charge of common law assault (a misdemeanor), all other charges being dropped. The petition also alleged that plaintiff had been arrested in New York City on February 22, 1970 on charges of possession of dangerous weapons, possession of dangerous drugs, possession of hypodermic instruments and obstructing governmental administration. The plaintiff pleaded guilty* to a violation of Penal Law, § 265.05 (a misdemeanor) on March 8, 1972.

The plaintiff filed an answer to the petition in which he did not deny the aforesaid allegations. Plaintiff moved to

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* The conviction on the plea of guilty was affirmed on appeal.

dismiss the petition or, in the alternative, sought a full evidentiary hearing for the purpose of demonstrating that he was not guilty of the charges upon which he had been convicted.

Both plaintiff and his counsel were heard by the Appellate Division after which that Court, in a memorandum-decision and order dated December 17, 1973, found that plaintiff was guilty of professional misconduct as an attorney. The Appellate Division rejected plaintiff's contentions that his pleas of guilty were made under North Carolina v. Alford, 400 U. S. 25 (holding that a Court could validly accept a plea of guilty while defendant asserts his innocence) and that therefore the pleas could not be used against him in this proceeding.

The Appellate Division held that plaintiff was bound by the pleas of guilty and that he did not have a right to relitigate the underlying facts. However, the Court did offer plaintiff a "hearing in mitigation" to determine the discipline to be imposed. The purpose of the "hearing in mitigation" was to enable plaintiff to offer testimony bearing upon his character and ability as an attorney which in turn might affect the discipline to be imposed. The Hearing Officer, Supreme Court Justice LYMAN H. SMITH, was to conduct the hearing and to report his findings without a recommendation. Judge SMITH gave plaintiff wide latitude in his testimony including a review of the events leading up to, and attendant upon, the guilty pleas. The hearing extended over several days during which more than 45 witnesses were called by plaintiff and 800 pages of minutes were taken.

After receiving Judge SMITH's report the Appellate Division rendered its decision ordering that plaintiff be disbarred. Plaintiff's appeal to the Court of Appeals as of right was dismissed "upon the ground that no substantial constitutional question is directly involved." (36 N Y 713 [Feb. 19, 1975].) Plaintiff's motion for leave to appeal to the Court of Appeals was denied (36 N Y 2d 642 [Feb. 19, 1975]) as was certiorari to the Supreme Court of the United States (423 U. S. 838 [Oct. 6, 1975]). Plaintiff commenced this action on March 11, 1975, subsequent to the dismissal of his appeal to the Court of Appeals but prior to the denial of certiorari by the Supreme Court of the United States.

Decision of the Court Below (Unreported)

After reviewing the facts and the plaintiff's contentions, Judge BURKE stated as follows:

> "There is no merit to the contention that he was denied equal protection of laws and due process by denial of a right of appeal to disbarred attorneys. Levin vs. Gulotta and related cases, Southern District of New York (three judge court judgment), affirmed by Supreme Court of the United States March 29, 1976.
>
> "This court should not interfere in state disciplinary proceedings, Erdmann vs. Stevens, 458 F. 2d. 1205 (2 Cir. 1972), cert. denied, 409 U. S. 889. Anonymous vs. Association of the Bar of the City of New York, 515 F. 2d. 427 (2 Cir. 1975)."

ARGUMENT

POINT I

THE PRINCIPLES OF COMITY AND FEDERALISM SUPPORT THE CONCLUSION OF THE COURT BELOW THAT THE FEDERAL COURTS SHOULD REFRAIN FROM INTERVENTION WHEN A STATE DISCIPLINES AN ATTORNEY LICENSED TO PRACTICE IN ITS COURTS.

The principles of comity and federalism have recently undergone significant application and expansion in a series of decisions beginning with Younger v. Harris, 401 U. S. 37, 27 L. Ed. 2d 669 (1971). Younger considered the propriety of Federal Court intervention in pending state criminal prosecutions. The United States Supreme Court there noted that there was a strong judicial policy against federal interference with state criminal proceedings and then went on to explain what it described as an even more vital consideration, an aspect of federalism which is:

> "* * * The notion of 'comity', that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" (id. at p. 44).

The Younger Court went on to state that the federal system is one in which:

> "* * * the National Government, anxious though it may be to vindicate and protect

> federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." (Ibid.)

The Younger decision also provided a series of requirements for the issuance of federal injunctive relief against state criminal prosecutions which included irreparable injury which would be great and immediate, and generally a bad faith prosecution with intent to harass. Federal intervention might also be justified if a statute is flagrantly and patently violative of express constitutional prohibitions. Mere facial invalidity of a statute would not justify federal interference with a state criminal proceeding.

It should be noted that the instant action was commenced in the Federal District Court on March 11, 1975 subsequent to the denial of leave to appeal to the Court of Appeals but prior to the denial of certiorari by the United States Supreme Court. There was thus a State Court proceeding pending when this action was commenced. The Supreme Court has also stated that "with respect to pending prosecutions the same standards apply to interference in the form of declaratory relief" (Huffman v. Pursue, Ltd., 420 U. S. 592, 602, 43 L. Ed. 2d 482 [1975]).

In Huffman (supra) the Supreme Court, expanding the Younger doctrine of abstention, held that:

> "The component of Younger which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding." (Id. at p. 604.)

The Court went on to find that the Federal District Court order in that case which had stayed a civil proceeding to enjoin a nuisance in a State Court had "disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." (id. at p. 605). The Court went on to state that "the considerations canvassed in Younger militate against" making a federal forum available prior to completion of state proceedings (id. at p. 606), and further to note that the judgment became final "in the sense of being non-appealable, at some point after the District Court filing * * *." The Court then stated:

> "* * * regardless of when the Court of Common Pleas' judgment became final we believe that a necessary concomitant of Younger is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in Younger." (Id. at p. 608.)

Intervention, said the Court, "is also a direct aspersion on the capabilities and good faith of state appellate courts." (id. at p. 608).

In the context of the instant appeal it might be said that plaintiff's institution of this action while his appeal was pending in the Supreme Court of the United States reflects on the abilities of that Court. Obviously this action was begun in order to obtain injunctive relief against the lawful disbarment

order of the Appellate Division.

As this Court has held however, an even stricter standard against Federal Court intervention is applied in the case of a state disbarment proceeding. In Anonymous v. The Association of the Bar of the City of New York, (515 F. 2d 427 [2d Cir., 1975]) the plaintiff sought to enjoin the defendant from pursuing a disciplinary proceeding against him on the ground that the defendant's use of immunized grand jury minutes violated his constitutional rights under the Fifth Amendment. The District Court (Hon. THOMAS P. GRIESA, U.S.D.J.) had granted defendant's motion to dismiss on the ground of abstention relying on Younger v. Harris (401 U. S. 37 [1971]) and Erdmann v. Stevens (458 F. 2d 1205 [2d Cir., 1971], cert. den. 409 U.S. 889 [1972]). This Court reviewed the Younger and Erdmann decisions as well as that of the Supreme Court of the United States in Huffman v. Pursue, Ltd., (420 U.S. 592, 43 L. Ed. 2d 482 [1975], reh. den. 421 U.S. 971, 44 L. Ed. 2d 463) and stated (Anonymous, supra, at p. 432):

> "Today more than ever, the integrity of the bar is of public concern and the state which licenses those who practice in its courts, and which is the only body that can impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the interloping of a federal court. As Mr. Justice Frankfurter observed in Theard v. United States, 354 U. S. 278, 281 (1957), the 'two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.'"

In the course of its opinion for affirmance this Court quoted from Judge MANSFIELD's opinion in Erdmann (supra, at p. 1210) wherein it was stated that:

> "* * * the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large."

It is significant that in the instant case the plaintiff was disbarred by the Appellate Division in January, 1975 but because of the intervention of the Federal District Court he continues to practice law in the State of New York. That plaintiff's disciplinary proceeding as well as his professional career have received more than the usual notoriety in the Rochester community is evident from the lengthy hearing in mitigation and the numerous witnesses who appeared thereat. That the delay occasioned herein by this Federal proceeding redounds to the detriment of the State bar and judicial system appears patent.

This Court's decisions in Anonymous (supra) and Erdmann (supra) were relied on in Brooks v. Fairfield County Committee, 409 F. Supp. 47 (D.C., Conn., 1976) where the Court held that principles of equity, comity and federalism prevented it from entertaining a disbarred attorney's attack upon the State procedures for disbarment.

The opinion of this Court in Anonymous (supra) relied heavily upon Huffman v. Pursue (supra). It was noted that Huffman establishes that the principles of comity and federalism

which are at the heart of Younger v. Harris (supra) may apply to civil matters as well as to criminal, depending on the effect of the federal suit upon the state's interests. A state's disciplinary proceedings against an attorney admitted to its bar have previously been characterized as "of a quasi-criminal nature" (In Re Ruffalo, 390 U.S. 544, 551 [1968]; see also Erdmann, supra) and this Court concluded that disbarment proceedings are now clearly within the abstention doctrine of Younger. (See also Matter of Abrams, 521 F. 2d 1094 [2d Cir., 1975]; Ahrensfeld v. Stephens, 528 F. 2d 193 [7th Cir., 1975]; Niles v. Lowe, 407 F. Supp. 132 [3 judge ct., Hawaii, 1976].)

Similarly, in Mildner v. Gulotta (405 F. Supp. 182 [E.D.N.Y. 1975], affd. ___ U.S. ___, 47 L. Ed. 2d 751 [1976]) United States District Court Judge NEAHER, in an opinion in which Judge MOORE concurred (Judge WEINSTEIN dissenting) wrote (at p. 184):

> "With all respect for the Supremacy Clause, we do not construe § 1983 or our constitutional question jurisdiction as authorizing an inferior federal court to pass upon the procedure employed by the State courts to discipline attorneys who practice before them or to interfere with their judgments in such matters. Nor do we read the statutes as in effect inserting a new form of federal review between the appellate courts of the State and the Supreme Court of the United States."

The Mildner opinion also relied on Huffman, Younger and Anonymous and further states (at p. 196):

> "I do not agree with plaintiff's contention that these cases are readily distinguishable from the principles enunciated in Huffman simply because the disciplinary proceedings involved here

> are no longer 'pending' at some level of the State courts."

This refutes plaintiff's argument herein that abstention is not appropriate here because the State proceeding was concluded when the Supreme Court of the United States denied certiorari.

Indeed the essence of the Mildner opinion, equally applicable herein, is that:

> "* * * expedience cannot overcome the principle that, for sound policy reaso s tied to the unique and peculiarly State-oriented function attorney disciplinary proceedings serve, Erdmann v. Stevens, supra, 458 F. 2d at 1210; Anonymous v. Association of the B..r of the City of New York, supra, 515 F. 2d at 432, the federal courts must be extraordinarily reluctant to inierject themselves into such proceedings." (Mildner v. Gulotta, 405 F. Supp. 182, 198.)

(See also Bonner v. Circuit Court of City of St. Louis, Mo., 526 F. 2d 1331 [8th Cir., 1975], cert. den. 96 S. Ct. 1418.)

From the foregoing it is clear, it is submitted, that the District Court was correct in dismissing the complaint both because the State proceeding had not been finally concluded when this action was begun and because under the extraordinary circumstances of a State disciplinary proceeding of a member of the State bar, the Federal Judiciary has expressed firm opposition to taking action which would interfere with the State Court's action.

The overall policy of nonintervention was also recently referred to by this Court in Wallace v. Kern, 520 F. 2d 400 (2d Cir., 1975). In Wallace, this Court, referring to the present broadened doctrine of abstention, stated (id. at p. 404):

> "In a recent explication of Younger in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975), Mr. Justice Rehnquist, writing the majority opinion, reiterated that federal injunctions against the 'state criminal law enforcement process' could be issued only '"under extraordinary circumstances where the danger of irreparable loss is both great and immediate."' Id. at 600, 95 S.Ct. at 1206, quoting from Fenner v. Boykin, 271 U.S. 240, 243, 46 S.Ct. 492, 70 L.Ed. 927 (1926). The Court again announced the twofold policy basis for non-intervention in state proceedings:
>
> "1) The recognition, both congressional and judicial, that federal courts should permit state courts to try state cases and that, if constitutional issues arise, the state court judges are fully competent to handle them, since they are bound by the Federal Constitution under Article VI.
>
> "2) The traditional doctrine that a court of equity should stay its hand when a movant has an adequate remedy at law."

The Wallace opinion goes on to note that Huffman v. Pursue, Ltd., (supra) broadened the Younger abstention doctrine to include civil actions in State Courts and that this Court has previously refused to intervene in bar association disciplinary proceedings in Erdmann v. Stevens, supra, and in Anonymous v. Association of the Bar of the City of New York, 515 F. 2d 427 (1975) and Anonymous J. v. Bar Association of Erie County, 515 F. 2d 435 (2d Cir., 1975), cert. den. ___ U.S. ___, 1975. There having been a final judgment by the State Court Judges who, it is respectfully submitted are fully competent to make such judgment, the Federal Courts should abstain from intervention in the plaintiff's disbarment.

POINT II

THIS ACTION IS BARRED BY THE APPLICATION OF THE DOCTRINES OF RES JUDICATA, JUDICIAL ESTOPPEL AND FULL FAITH AND CREDIT.

In Huffman v. Pursue (supra) which is discussed at length in Point I (supra) the Court, while stating that a litigant may be entitled to relitigate federal issues after completing State court proceedings, stated as follows in a footnote (420 U.S. 592, 606):

> "We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 USC § 1983 [42 USCS § 1983] of federal issues arising in state court proceedings. Cf. Preiser v. Rodriquez, 411 U.S. 475, 497, 36 L. Ed. 2d 439, 93 S Ct 1824 (1973)."

While Preiser v. Rodriquez (supra) noted that res judicata principles are not wholly applicable to habeas corpus proceedings such as were there involved, the Court went on to state that "res judicata has been held to be fully applicable to a civil rights action brought under § 1983. Coogan v. Cincinnati Bar Assn. 431 F 2d 1209, 1211 (CA 6 1970); Jenson v. Olson, 353 F 2d 825 (CA 8 1965); Rhodes v. Meyer, 334 F 2d 709, 716 (CA 8 1964); Goss v. Illinois, 312 F 2d 257 (CA 7 1963.)"

In Thistlewaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974) cert den. 419 U.S. 1093, 42 L. Ed. 2d 686, the plaintiff sued for a declaration of unconstitutionality of a local park rule against pamphleteering. The same issue had previously been

litigated in the State courts. This Court said (id. at p. 341):

> "* * * it is quite clear that the gist of the current suit is that the regulations are unconstitutional; it is also clear that this question was at issue and determined against the appellants in the state action."

This Court affirmed the judgment of the District Court dismissing the complaint on the grounds of res judicata.

In the instant action the issues raised by the plaintiff herein have been raised previously in the State court proceeding. The applicability and significance of North Carolina v. Alford (400 U.S. 25) was argued in the Appellate Division and was discussed by that Court in its decision (46 A D 2d 490, 492). The constitutional challenge to New York State disbarment procedures was made by plaintiff both in his unsuccessful attempt to appeal to the New York Court of Appeals and in his application for certiorari to the Supreme Court (Turco, Jr. v. Monroe County Bar Association of the State of New York, 74-1592). In his brief in support of his motions for a stay and for leave to appeal to the Court of Appeals plaintiff argued (at p. 40):

"Constitutional Issues

> "The appellant has been deprived of liberty and property without due process of law in violation of the fifth, sixth, ninth and fourteenth amendments to the United States Constitution and the corresponding provisions of the New York State Constitution in that he was denied the right to present evidence of his innocence in these disciplinary proceedings.

"Appellant was further denied due process of law because his disbarment is based upon allegations, unsupported by any evidence, and not contained in the petitioner's charges against him.

"Appellant was further denied due process of law because he was foreclosed from repudiating the allegations, not contained in the Bar Association's charges, that were relied upon by the Appellate Division in its judgment of disbarment.

"The appellant was denied due process of law and equal protection of the law because his disbarment was discriminatory and based upon mere suspicion and conjecture and not evidence.

"The appellant was further denied due process of law because the petition was jurisdictionally defective in that there was no basis for charging him with criminal convictions where they were based upon an 'Alford' plea."

As previously noted the Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved." (36 N Y 2d 713)

Because the issues raised herein have previously been raised by plaintiff and have been determined adversely to him he should now be precluded from relitigating these issues by the principles of full faith and credit (28 U.S.C. 1738) and res judicata (Thistlewaite v. City of New York (supra); McCune v. Frank, 521 F. 2d 1152 [2d Cir. 1975]; Tang v. Appellate Division, 487 F. 2d 138 [2d Cir., 1975], cert. den. 416 U.S. 906, 94 S. Ct. 1611 [1975]).

POINT III

THE PLAINTIFF HAS NOT BEEN DENIED DUE PROCESS BY THE REFUSAL OF THE APPELLATE DIVISION TO HOLD A FULL EVIDENTIARY HEARING OF THE PLAINTIFF'S TWO MISDEMEANOR CONVICTIONS.

The Appellate Division order of December 17, 1973 found that the plaintiff was guilty of professional misconduct. The bases for the finding were the two misdemeanor convictions discussed previously. Conviction of a crime involving moral turpitude has previously been held to be a basis for disbarment (see e.g. In re Crisona, 43 A D 2d 299 [2d Dept., 1974]; Matter of McNally, 252 App. Div. 550 [1st Dept., 1937]). Plaintiff admitted the convictions but attempted to prove that he was not guilty of the charges. In this regard he relied upon North Carolina v. Alford (400 U.S. 25). Responding to this contention, the Appellate Division stated (46 A D 2d 490, 492):

> "We concluded that the Alford case does not support respondent's contention; that in Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made (see, accord People v. Clairborne 29 N Y 2d 950; People v. Foster, 19 N Y 2d 150; People v. Griffin, 7 N Y 2d 511. As we shall point out later herein, no claim is made, nor can there be, that either of respondent's above guilty pleas was involuntary." (underscoring added.)

The opinion goes on to note that the plea of nolo contendere has been abolished in New York (Ando v. Woodbury, 8 N Y 2d 165,

170). The Appellate Division thus ruled that the convictions were final and binding upon plaintiff unless he claimed that he had evidence which had been unavailable to him at the time of the pleas (Matter of Keogh, 17 N Y 2d 479, 481). The plaintiff made no such claim and consequently the Appellate Division declined to permit the plaintiff to relitigate in an evidentiary hearing that which had been determined by the judgment of conviction. Clearly the plaintiff had had total opportunity to have a trial with full due process in the criminal prosecutions which resulted in his pleas of guilty. (In re Abrams, 38 A D 2d 334 [1st Dept., 1972]). However, he chose to waive his right to a trial in each case and having intelligently and voluntarily waived his rights at that time he is now bound by those decisions. (Cf. McGautha v. California, 402 U.S. 183; Brady v. United States, 397 U.S. 742; People v. Dwight S., 29 N Y 2d 172; People v. Lynn, 28 N Y 2d 196; Lee v. County Court of Erie County, 27 N Y 2d 432.)

The constitutional rights which are waived by a guilty plea were most recently discussed in Fruchtman v. Kenton, 531 F. 2d 946 (9th Cir., 1976). The Court in that case also discussed the collateral consequences of a guilty plea such as loss of good time credit, loss of the right to vote and the right to travel abroad. The Court upheld the conviction on the guilty plea despite the collateral consequence of deportation of the party pleading guilty only to the criminal activity and not having foreseen the collateral consequence. A similar conclusion was

reached by this Court in Santelises v. Immigration and Naturalization Service, 491 F. 2d 1254 (2d Cir., 1974).

In Tempo Trucking and Transportation Corp. v. Dickson, 405 F. Supp. 506 (E.D.N.Y., 1975) a customhouse cartman's license had been revoked as a collateral consequence of a misdemeanor conviction resulting from an "Alford" plea. The plaintiff made the same arguments made by the plaintiff herein; i.e., that the "Alford" plea could not be used to revoke his license and that the government would have to obtain independent evidence of the facts and circumstances underlying the conviction. The District Court distinguished an "Alford" plea from a nolo contendere plea since in the former the Court must be satisfied that there is a factual basis for the plea but such is not necessary in the case of the latter. The Court stated (id. at p. 518) that:

> "As Garite's conviction was based upon an Alford plea which was supported by the finding of a factual basis, it would seem to follow a fortiori that the hearing officer did not have a duty to explore the facts behind Garite's conviction."

The Court concluded that the plaintiff had not been deprived of any fundamental rights at the administrative hearing which resulted in the revocation of the license.

Thus, in the instant appeal the plaintiff's argument as to the "Alford" plea must fail for several reasons. First, as the Appellate Division found, there is substantial indication in the transcripts that the plaintiff's pleas were "nothing less than pleas of guilty to reduced charges" (29a).* Second, North Carolina v. Alford (400 U.S. 25 [1970]) simply does not stand for any

* Appendix to appellant's brief

principle other than that a Court may properly accept a plea of guilty while the defendant continues to assert his innocence. Alford does not say that the plea cannot have collateral consequences. And third, as the cases interpreting Alford have shown, the requirements preliminary to a court's accepting an "Alford" plea insure that it is voluntarily made and that there is an evidentiary basis therefor.

POINT IV

THE DISBARMENT PROCEDURES OF THE APPELLATE DIVISION DID NOT DENY PLAINTIFF ANY FUNDAMENTAL RIGHTS.

The complaint alleges, inter alia, that plaintiff was denied due process because his disbarment was based on allegations unsupported by evidence and not contained in the Bar Association's petition, because he was foreclosed from repudiating the allegations by presenting evidence of his innocence and because he did not have an appeal as of right to the Court of Appeals.

An extensive review of attorney disciplinary proceedings in New York is contained in the opinion of the Court in Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y., 1975), aff'd ____ U.S. ____ 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976).* There the Court reviewed the provisions of Judiciary Law, § 90 which provides the statutory authority for such proceedings and the Court noted that subdivision 6 of section 90 makes quite clear the obligation placed on the

* The affirmance in Mildner signifies an affirmance on the merits under the principle enunciated in MTM, Inc. v. Baxley, 420 U.S. 799, 43 L. Ed. 2d 636 (1975).

Appellate Division to comply with procedural due process (id. at p. 189). The Court also discusses the "unique status" of disciplinary proceedings and the Appellate Division's "inherent power of autonomous control over the conduct of its officers". (Id. at p. 191; citing Erdmann v. Stevens, 458 F. 2d 1205 [2d Cir., 1972].)

The Mildner decision conclusively determined the question of constitutionality of the limited right of appellate review when the Court stated (id. at p. 193):

> "[4,5] While it is true that where the right to an appeal is afforded some litigants and capriciously and arbitrarily denied to others, there is a violation of the Equal Protection Clause, Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), identification of differing treatment is only the beginning of an equal protection inquiry. There must be recognition that, in disciplining professionals, the State may legitimately find reason to conclude that differing procedural safeguards are appropriate for different professions. See Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610-11, 55 S.Ct. 570, 79 L.Ed. 1086 (1935); Porcum v. Board of Regents of State of New York, 491 F.2d 1281, 1286 (2 Cir. 1974). Thus there is no equal protection problem when the denial of appellate rights to attorneys to the same extent afforded other professionals or litigants is reasonable, resting 'upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

> "[6] We have no difficulty finding this standard of constitutionality adequately met in this case. We agree with the reasoning of Judge MacMahon in Javits, supra, wherein he concluded there was no denial of equal protection in New York's failure to make Article 78 review proceedings available to attorneys. The claim here is no more than another facet of the one made in Javits; it makes no difference whether one focuses on the disparity itself or on the various means of redressing it."

The Court in Mildner went on to state that accused attorneys are not deprived of due process by the Appellate Division procedures which do not provide for an evidentiary hearing before the Court (id. at p. 194) and the Court stated:

> "We would therefore reject those claims raised in the Mildner and Gerzof complaints which suggest that the lack of evidentiary basis for the decisions was itself a denial of due process or equal protection * * *."

The question of the proper scope and content of a "hearing in mitigation" was most recently discussed in Matter of Levy v. The Association of the Bar of the City of New York, 37 N Y 2d 279 (1975). There the Court held:

> "* * * that while an attorney convicted of a criminal offense may introduce evidence in mitigation and explanation in a subsequent disciplinary proceeding, he may not relitigate the issue of his guilt of the offense for which he was convicted." (Id. at p. 280)

The Court stated that the doctrine of collateral estoppel prevents one who has been convicted in a criminal proceeding "in which the standard of proof called for the highest quantum--beyond a reasonable doubt" from relitigating the issue of his guilt in a disbarment proceeding and this is neither unfair nor unreasonable.

However the Appellate Division may permit the attorney (as was done in the instant case) to offer any proof reasonably relevant to the ultimate issue -- "the character of the offense committed and the nature of the penalty, if any, appropriately to be imposed" (id. at p. 282).

There is a further reason why the plaintiff should not now be permitted to challenge the authority of the Appellate Division, in deciding the question of discipline, to draw upon testimony which plaintiff's counsel had stipulated to for the record upon the taking of his guilty pleas. Not only did he formally agree to such statements by the prosecution but he has also pursued appeals in each of the criminal cases, both of which resulted in affirmances. There is thus no basis for the plaintiff's contention that the Appellate Division applied a double standard in the taking of evidence in the hearing in mitigation of discipline. Rather, the Court properly drew upon the fact of the convictions from the official documents and records supportive thereof without receiving new testimony or evidence, whereas, insofar as matters beyond the records of conviction are concerned, the plaintiff himself testified at the hearing in mitigation on such matters as his arrest in Canada while he was using false identification.

Nor did the Court offend principles of due process as alleged because it did not give notice of the scope of the hearing in mitigation. Initially it can be seen that such a hearing must have broad latitude if it is to be meaningful. Further, the Appellate Division, which is responsible for the discipline of

attorneys, must have broad discretion, which discretion it is respectfully suggested is not amenable to review by this Court, to determine what issues are appropriate in a hearing held to determine the discipline to be imposed.

CONCLUSION

THE ORDER AND JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

Dated: October 25, 1976

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Arthur F. Turco, Jr.,
Plaintiff-Appellant,

-against-

The Monroe County Bar Assoc., et al.
Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:

I am over eighteen years of age and a typist in the office of the Attorney General of the State of New York, attorney for the defendants-appellees herein.

On the 29th day of October 1976 I served the annexed brief for appellees upon the attorneys named below, by depositing two copies thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorneys at the address es within the State respectively theretofore designated by them for that purpose as follows:

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Beverly J. Smith

Sworn to before me this
29th day of October 1976

James A. Economides

JAMES A. ECONOMIDES
Notary Public, State of New York
Residing in Albany County
Commission Expires March 30, 19...78